IN THE

Supreme Court of the United States

October Term, 1968.

No. ~~1081.~~ 93

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, TRANSCONTINENTAL GAS PIPE LINE CORPORATION and TEXACO INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE OF NORTHWEST JERSEY NATURAL GAS, INC., ELIZABETHTOWN CONSOLIDATED GAS COMPANY, NEW JERSEY NATURAL GAS COMPANY, SOUTH JERSEY GAS COMPANY, PHILADELPHIA GAS WORKS, PHILADELPHIA ELECTRIC COMPANY, LONG ISLAND LIGHTING COMPANY, AND THE BOARD OF PUBLIC UTILITY COMMISSIONERS OF NEW JERSEY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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Northwest Jersey Natural Gas, Inc., Elizabethtown Consolidated Gas Company, New Jersey Natural Gas Company, South Jersey Gas Company, The Philadelphia Gas Works, Philadelphia Electric Company, Long Island Lighting Company and The Board of Public Utility Commissioners of New Jersey respectfully move for leave to file the accompanying brief *amici curiae* in support of the Petition for a Writ of Certiorari of Public Service Electric and Gas Company. The consent of Petitioner has been obtained. The consent of Respondents Transcontinental Gas Pipe Line Corporation and Texaco Inc. has been requested but has not been granted. The consent of the Federal Power Commission has been requested, but has been neither granted nor withheld.

Seven of the movants are public utility companies which, among other things, own and operate retail gas distribution systems for sale of gas to the consuming public. The Board of Public Utility Commissioners is a state agency having regulatory jurisdiction over public utilities in the State of New Jersey, including retail gas distribution companies.

City Gas Company of New Jersey was an intervenor before the Federal Power Commission in these matters Effective September 30, 1965, City Gas Company of New

Jersey became consolidated with City Gas Company of Phillipsburg, New Jersey, and City Gas Company of Newton, New Jersey, under the new corporate name of "Northwest Jersey Natural Gas, Inc." The successor corporation serves consumers in Mercer, Hunterdon, Warren, Morris and Sussex Counties in New Jersey. The successor corporation, like its predecessors, is a public utility under the jurisdiction of the New Jersey Board of Public Utility Commissioners.

Elizabethtown Consolidated Gas Company is a public utility corporation organized under the laws of New Jersey. It distributes natural gas to over 160,000 customers in 21 municipalities in Union and Middlesex Counties, New Jersey.

New Jersey Natural Gas Company is a public utility corporation organized under the laws of New Jersey. It distributes natural gas to some 150,000 customers in that state.

South Jersey Gas Company is a public utility corporation organized under the laws of New Jersey. It distributes natural gas to some 92,400 customers in South Jersey.

Philadelphia Electric Company is a public utility corporation organized under the laws of the Commonwealth of Pennsylvania. It distributes natural gas to some 240,000 customers in Delaware, Chester, Montgomery, Bucks and Lancaster Counties, Pennsylvania.

Under an agreement with the City of Philadelphia, the Philadelphia Gas Works Division of The United Gas Improvement Company (a Pennsylvania corporation) operates the municipally-owned Philadelphia Gas Works and related facilities, distributing natural gas to some 600,000 customers in the City of Philadelphia.

Long Island Lighting Company is a public utility corporation organized under the laws of the State of New York. It distributes natural gas to some 368,000 customers on Long Island, New York, in the Counties of Nassau and

Suffolk and in the Fifth Ward of the Borough of Queens.

All of the above distribution companies (herein called "Distributors") are direct or indirect customers of Transcontinental Gas Pipe Line Corporation (Transco).

These Distributors, together with the Petitioner in this case, are responsible for the bulk of natural gas supplied to retail customers in the State of New Jersey and for substantial amounts of gas supplied in the States of Pennsylvania and New York.

All of the above Distributors, except Long Island, as well as the Board of Public Utility Commissioners of the State of New Jersey, were intervenors in proceedings which culminated in the opinion and order of which review is sought here. The interest of Movants in the grant of certiorari in this case arises from the potential impact of the decision of the Federal Power Commission, affirmed by the Court of Appeals, upon the effective regulation of the field prices charged by producers of natural gas sales in interstate commerce. In particular Movants are concerned with the impact of the transaction certificated by the Commission upon the proper exercise of the Commission's jurisdiction over such field prices in Louisiana and Texas, the major source of supply for pipelines supplying gas to the Distributors.

The proper price at which supplies of natural gas should enter interstate commerce has been, perhaps, the most hotly contested issue under the Natural Gas Act during the past decade. *E.g., Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378 (*"Catco"*); *Signal Oil & Gas Co. v. FPC*, 238 F. 2d 771 (3rd Cir. 1956), *cert. denied*, 353 U. S. 923 (1957); *UGI v. FPC*, 269 F. 2d 865 (3rd Cir. 1959), *rev'd mem. sub nom. Public Service Comm'n. v. FPC*, 361 U. S. 195; *Public Service Comm'n. v. FPC*, 287 F. 2d 146 (D. C. Cir. 1960), *cert. denied*, 365 U. S. 880; *UGI v. FPC*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U. S. 879.

While these cases dealt with the Commission's statutory duty with regard to the certification under § 7 of the Natural Gas Act of applications by independent producers for certificates, a parallel series of cases has dealt with the Commission's duty when the acquisition of gas involved is in a "nonjurisdictional" posture—as Respondents contend is so in the present case. The Courts have held that jurisdiction over the pipeline gives the Commission authority and duty to inquire into the acquisition of gas. *Public Service Comm'n. v. FPC,* 287 F. 2d 143 (D. C. Cir. 1960) (the "Rayne Field" case); *FPC v. Transcontinental Gas Pipe Line Corp.,* 365 U. S. 1 (the "X-20" case).

In other analogous cases, the Commission has found it necessary to exercise jurisdiction over certain supposedly "nonjurisdictional" transactions—because of the regulatory gaps they presented—and has demonstrated to this Court and the courts of appeals that such regulation is necessary and proper under the Natural Gas Act. *California v. Lo-Vaca Gathering,* 379 U. S. 366; *FPC v. Amerada Petroleum Corp.,* 379 U. S. 687; *United Gas Improvement Co. v. Continental Oil Co.,* 381 U. S. 392. In the present case, the Commission abandoned these precedents and permitted just such a gap in the regulation of the interstate movement of gas. Recently, in a three-to-two decision the Commission has relied on the precedent of the present case in order to open still wider the gap in regulatory control of so-called "nonjurisdictional" interstate sales of gas. *Florida Gas Transmission Co.,* Docket No. CP65-393, Opinion No. 516, issued March 1, 1967.

Because of the serious threat to the effective regulation of interstate sales of natural gas presented by the Commission's abdication of jurisdiction in the present case and the more far-reaching threat to the sort of effective price regulation which Movants have sought as a protection for their consumer customers, the Movants are constrained to seek the permission of this Court to advance the argument

set forth in the accompanying brief *amici curiae* in support of the Petition for a Writ of Certiorari.

Respectfully submitted,

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INTEREST OF AMICI CURIAE.

The interest of the amici curiae in this case is set forth in the Motion to which this Brief is attached.

REASON FOR GRANTING THE WRIT.

The decision below permits the opening of a gap in regulatory jurisdiction over interstate sales of natural gas. Unfortunately, because of the posture of the transaction involved—delivery of gas by Texaco to Transco and a receipt of gas by Texaco from Transco—the nature of the gap has been obscured.

Because of the "intra-Texaco" nature of the transaction here under consideration the Court of Appeals below was apparently misled into considering various purely technical questions, without coming to grips with the real policy issue posed under the Natural Gas Act. Thus the court concerned itself with questions of passage of title and bailment of a fungible commodity. On the basis of these technical considerations it concluded that no "sale" had taken place and that the entire transaction was as nonjurisdictional as concededly would have been Texaco's use of its own gas near the wellhead in Louisiana or Texas. Such an approach overlooks the real effect of the transaction. This effect can be shown best by hypothetical illustration. Sales by producers for ultimate intrastate use and consumption by producers of their own gas within the state of production are both transactions which are excluded from the Commission's jurisdiction by the Natural Gas Act. Sales in interstate commerce, however, are uniformly subjected to Commission jurisdiction, and Congress intended no "attractive gap" to exist in such regulation. *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1.

Given this jurisdictional structure, the following situation will inevitably arise when an excessively high interstate price structure for new gas has been created as the result of a relative inadequacy of supply during a preceding period. The individual producer will, if possible, seek to avoid any undercutting of a high interstate price structure by using "cheaper" surplus new gas in its refineries

or petrochemical plants within the state of production. Independent producers are increasingly diversifying their operations by expansion into the field of petrochemical manufacture, a process which consumes enormous quantities of natural gas. Such a practice can and does obviously have an adverse impact on the consumer of natural gas, because it tends to insulate the interstate market from the helpful corrective action of abundant supplies pressing on the market. Such a situation however may be presumed to have been contemplated by Congress and to have formed part of the balance which Congress struck between intra- and interstate regulation. The balance is reasonable, since refinery and petrochemical concentration within a given state is not likely to be unreasonably dense.

However, if the intrastate refinery market is saturated and the producer, to avoid undercutting an artifically high interstate gas price structure, seeks an outlet in its refineries or petrochemical plants in all the other 47 continental states, the Natural Gas Act clearly imposes on the Commission the duty under § 7 to inquire into the public interest impact of such transactions. *FPC v. Transcontinental Gas Pipe Line Corp., supra.*

Both the Commission and the Court of Appeals failed to appreciate the nature of this duty, apparently because both viewed a transaction which was "intra-Texaco" as being identical in effect with one which was truly "intrastate" in nature—despite the fact that the interstate character of this Louisiana-Pennsylvania transaction was obvious. In so concluding the Commission and the Court of Appeals acquiesced in the refusal of Texaco and Transco to put in the record any evidence from which the Commission could determine the impact of Transco's acquisition of this substantial supply of (cheap? expensive?) gas upon field prices generally and upon the interstate market.* The action of the Commission in issuing certificates of

* Moreover the Commission refused to ~~advance~~ receive an offer of evidence on this subject by intervenors (972-74).

public convenience and necessity in the face of such a blank in the record substituted guess work for informed discretion and constituted plain error. *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378. The inevitable effect of such a ruling, made as a matter of law, is that, while on the one hand it does nothing to impede the upward movement of prices when supplies are short, on the other hand, when supplies become abundant it insulates the interstate market from downward price pressure by permitting the proliferation of this type of "intrastate" sale throughout the continental United States. The threat is a real one (R. 1856).

Equally serious, the present case has now become a precedent for permitting other users of large quantities of gas to acquire substantial reserves by means of such "intrastate" transactions. *Florida Gas Transmission Co.*, Docket No. CP65-393, Opinion 516, issued March 1, 1967. That case, on "all fours" with the *X-20* case, *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, involved a sale by independent producers in Louisiana to Florida Power & Light Company for use as fuel for its electric generating plants. The Commission expressly held that it had no jurisdiction over the price of the producers' sales, despite their interstate character and potential adverse impact on field prices. It thereby abandoned the entire in-line approach which it had developed for South Louisiana in a series of earlier cases and which this Court had affirmed. *United Gas Improvement Co. v. Callery Properties*, 382 U. S. 223. It is significant that this abandonment came in the *Florida Gas* case, in which there were no intervenors interested in safeguarding consumer price protection.* The issue of jurisdiction over such sales was expressly reserved by this Court in *FPC v. Lo-Vaca Gathering*, 379 U. S. 366. The case here under review opens a serious gap in the regulation of the interstate movement of gas, a gap which has already

* The New York Public Service Commission has subsequently noticed its intervention in the *Florida Gas* case and requested rehearing on this jurisdictional issue.

been substantially widened in the *Florida Gas* case, with increasing potential for further widening still and consequent harm to the consumer.

CONCLUSION.

For the foregoing reasons the Distributors and the New Jersey Board urge this Court to grant a writ of certiorari to review this impotant jurisdictional issue.

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